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No. ———

Supreme Court of the United States

(October Term, 1947)

MATTIE MCELROY, nee HARJO,
Petitioner,

VERSUS

W. M. PEGG; CHARLES S. SZENASI and LENNA SZENASI, his wife; W. A. BEAM and EFFIE BEAM, his wife; HENDRIX MCMILLAN and LONIE MCMILLAN, his wife; OREL BUSBY and HOPE BUSBY, his wife; GEORGE MILTON HILL; JENCY MARIE HILL; FLOYD HILL; BOOKER MEADERS; J. G. WITHERSPOON, OKLAHOMA STATE BANK, Ada, Oklahoma, a Corporation; MAY TATUM, also known as Mrs. J. M. Tatum; MYRTLE TATUM, now Riddell; CURTIS TATUM; RAYMOND TATUM; GRACE TATUM; BRICE HELEN TATUM, now Gregg; BETTY JO TATUM, now Davis; MARK TATUM, JR., a minor over fourteen years of age; ALONZO PERRY; and LUCILLE PERRY, now Hager, and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI

The petitioner, Mattie McElroy, *nee* Harjo, respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit in

that certain cause therein entitled Mattie McElroy *nee* Harjo, Appellant v. W. M. Pegg; Charles S. Szenasi, and Lenna Szenasi, his wife; W. A. Beam and Effie Beam, his wife; Hendrix McMillan and Lonie McMillan, his wife; Orel Busby and Hope Busby, his wife; George Milton Hill; Jency Marie Hill; Floyd Hill; Booker Meaders; J. G. Witherspoon, Oklahoma State Bank, Ada, Oklahoma, a corporation; May Tatum, also known as Mrs. J. M. Tatum, Myrtle Tatum; Curtis Tatum; Raymond Tatum; Grace Tatum; Brice Helen Tatum, now Gregg; Betty Jo Tatum, now Davis; Mark Tatum, Jr., a minor over fourteen years of age; Alonzo Perry; and Lucille Perry, now Hager, and United States of America, Appellees, being therein No. 3561. Said judgment was entered by said Circuit Court of Appeals on the 19th day of April, 1948. The decision in the case has not been reported but is shown in the printed transcript of record filed herewith.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit in this cause is set forth in full in the record and is copied at length in the appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (28 U. S. C., Sec. 347). This petition for Writ of Certiorari is filed within three months after the filing of said opinion and judgment on

April 19, 1948, and is made pursuant to Section 5 (b) of Rule 38 of the rules of this Court and in particular the part thereof which indicates that a Writ of Certiorari may issue to a Circuit Court of Appeals where a Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court or has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED

A.

Whether under the facts of this case Section 1 of the Act of Congress of July 2, 1945, Public Law 116, 79th Congress, 59 Stat. 313, can be given effect without depriving petitioner of property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

B.

Whether after petitioner had acquired the fee simple title to real property by devise Congress could ratify and confirm a deed thereon which had been executed by petitioner's devisor in violation of restrictions on alienation imposed by Section One of the Act of May 27, 1908, 35 Stat. 312, and Section One of the Act of Congress of May 10, 1928, 45 Stat. 495, and regulations promulgated thereunder by the Secretary of the Interior and thereby transfer the title to real estate from this petitioner to the respondents consistently with the due process clause of the Fifth Amendment to the Constitution of the United States?

C.

Whether under the facts of this case, after petitioner's rights as devisee had vested under the will after the death of petitioner's devisor, The Secretary of the Interior could have validated a void deed which had been executed by petitioner's devisor by an approval which would have related back to the date of the deed so as to cut off the rights of petitioner under the will and whether Congress could validate such void deed and thus cut off the rights of petitioner as devisee under said will?

D.

Whether under the type of restrictions upon alienation involved approval by the Secretary of the Interior or removal of restrictions by him was a condition prerequisite to the power of plaintiff's devisor to convey the land involved by deed and whether such approval and his consent had to be given before the final delivery of a deed in order for it to be effective?

SUMMARY STATEMENT OF MATTERS INVOLVED

This action was commenced in the United States District Court for the Eastern District of Oklahoma on October 8, 1946, by the petitioner, Mattie McElroy, *nee* Harjo, as plaintiff. The suit is brought to quiet title to a tract of land containing nine acres, situated in Pontotoc County, Oklahoma, and to recover possession of a part of it of which petitioner is not in possession. The basis of Federal original jurisdiction in the District Court is that a substantial Federal Question is presented as to the constitutionality of the first section of the Act of Congress of July 2, 1945, Public

Law 116, 79th Congress, 59 Stat. 313, and as to the construction to be placed upon said section and the last proviso therein and other acts of Congress, the amount or value in controversy being in excess of $3,000.00, exclusive of interest and costs (Judicial Code, Sec. 24, as amended, 28 U. S. C., Sec. 41) (R. 1, 77). The plaintiff claims title to the real estate involved as the residuary devisee in the will of her mother, Lucy Harjo, deceased, full blood Chickasaw Indian, Dawes Commission Roll No. 571, the plaintiff being enrolled as of one-half degree of Indian blood upon the final approval roll of Chickasaws by blood opposite Roll No. 575. Lucy Harjo had acquired title to the land involved by a deed dated October 20, 1919, which had been executed by N. B. Haney, Jr., and his wife, Carrie M. Haney. The consideration for said deed to Lucy Harjo was the payment to said grantors of the sum of $2,000.00 by direction of the Secretary of the Interior from funds of said Lucy Harjo, held by the United States in trust, subject to disbursement under the supervision of the Secretary of the Interior, which had been derived from oil royalties from restricted land which had been allotted to said Lucy Harjo by virtue of her enrollment as a full blood citizen of the Chickasaw Nation, and said deed provided:

> "That no lease, deed, mortgage, power of attorney, contract to sell, or other instrument, affecting the land herein described, or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior" (R. 3, 103, 244, Plaintiff's Exhibit 4).

Said Lucy Harjo died on December 26, 1938 (R. 4, 110). Petitioner herein, plaintiff in the District Court, attacked the validity of a deed which was executed by said Lucy Harjo to W. M. Pegg, on November 17, 1932, which was not made with consent of the Secretary of the Interior and which was not approved by the Secretary of the Interior and the claim of title by the defendants (respondents herein) is based on that deed. The will of Lucy Harjo was admitted to probate in the proper state court of Oklahoma and contained a general residuary clause which devised and bequeathed all of her property not specifically mentioned in the will to the petitioner (R. 4, 5, 107, 300-313, Plaintiff's Exhibit 28).

Before the plaintiff brought this suit the probate proceedings on the estate of said Lucy Harjo, deceased, were closed by a final decree of distribution and a *nunc pro tunc* order correcting same which decreed distribution of the estate of said Lucy Harjo in accordance with the terms of said will. Plaintiff's claim of title is based on said will and the probate proceedings establishing its validity. The District Court rendered a judgment against petitioner and in its conclusions of law upheld the validity of Section 1 of the Act of July 2, 1945, *supra*, which attempted to validate the deed which had been made by Lucy Harjo to W. M. Pegg on November 17, 1932. There was no request by Lucy Harjo or W. M. Pegg for the removal of the restrictions on the land involved or for an approval of the deed to Pegg, and it was not intended by the grantee or the grantor that said deed be approved, and it was established that it was finally delivered on the day of its date, November 17, 1932 (R. 188). The petitioner herein appealed from the

judgment of the District Court to the United States Circuit Court of Appeals for the Tenth Circuit and that Court rendered an opinion affirming the judgment of the District Court and it is attempted by this petition to obtain a review of such decision and opinion of the Circuit Court of Appeals. Other pertinent facts are set forth in the opinion of the Circuit Court of Appeals, a copy of which is attached as an appendix to this petition.

REASONS RELIED UPON FOR ISSUANCE OF WRIT

1. The question involved is one of Federal law which has not been but should be settled by this Court. There are many tracts of land owned by Indians of the Five Civilized Tribes in Oklahoma under conveyances to them containing clauses restricting the power of alienation or right of alienation unless any conveyance is made with the consent of and approved by the Secretary of the Interior, and the question involved in this case as to the constitutionality of the first section of the Act of July 2, 1945, 59 Stat. 313, is very important in determining the validity of many titles.

2. The decision of the United States Circuit Court of Appeals in this case is probably in conflict with applicable decisions of this Court cited and discussed in the brief filed herewith.

3. The decision of the United States Circuit Court of Appeals for the Tenth Circuit in this case is probably in conflict with prior decisions of that Court as to the nature of the restrictions on alienation which existed on the land involved in the hands of the grantor in the deed which is

alleged by petitioner to be void and such decisions are not shown to be inapplicable by the opinion of the Circuit Court of Appeals in this case [*U. S.* v. *Watashe*, 102 Fed. (2d) 428; *U. S.* v. *Williams*, 139 Fed. (2d) 83, *cert.* denied, *Williams* v. *U. S.*, 322 U. S. 727, rehearing denied, 322 U. S. 770].

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in finding and holding that the first section of the Act of Congress of July 2, 1945, Public Law 116, 79th Congress, 59 Statutes 313, validated the deed from plaintiff's devisor, Lucy Harjo, to W. M. Pegg dated November 17, 1932.

2. The Circuit Court of Appeals erred in holding that the first section of the Act of Congress of July 2, 1945, Public Law 116, 79th Congress, 59 Stat. 313, is constitutional as applied to petitioner's rights in this case.

3. The Circuit Court of Appeals erred in finding and holding that the title of petitioner was subject to being cut off by the Curative Act (Section One, Act of July 2, 1945, 59 Stat. 313) and that Congress could thereby transfer the title to the land involved from this petitioner to the respondents.

4. The Circuit Court of Appeals erred in not holding that the deed from Lucy Harjo to W. M. Pegg dated November 17, 1932, was absolutely null and void and that it could not be validated as against petitioner's vested rights by the first Section of the Act of Congress of July 2, 1945 (59 Stat. 313).

5. The Circuit Court of Appeals erred in not holding that a deed which was executed by this petitioner to the respondent, Orel Busby, dated July 27, 1936, covering a small parcel of the land involved was void and ineffective.

6. The Circuit Court of Appeals erred in not reversing the judgment of the District Court and in not remanding the case to the District Court with directions to render judgment for petitioner (plaintiff in the District Court) for the relief sought by her.

Petitioner states that said questions properly appear in the record and were raised before the trial court and the Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue out of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit, requiring said Court to send to this Court a full and complete transcript of the record in that Court in case numbered 3561 therein, entitled Mattie McElroy, *nee* Harjo, appellant, v. W. M. Pegg, *et al.*, appellees, and that the decision and judgment of said Circuit Court of Appeals be reviewed by this Honorable Court and that the judgment of said Circuit Court of Appeals be reversed and for such other and further relief as this Court may deem proper.

JAMES W. BOUNDS,
Hugo, Oklahoma,

Counsel for Petitioner.

Of Counsel:

TURNER M. KING,
CARLOSS WADLINGTON,
Ada, Oklahoma.

No. ———

Supreme Court of the United States

(October Term, 1947)

MATTIE MCELROY, nee HARJO,
Petitioner,

VERSUS

W. M. PEGG; CHARLES S. SZENASI and LENNA SZENASI, his wife; W. A. BEAM and EFFIE BEAM, his wife; HENDRIX MCMILLAN and LONIE MCMILLAN, his wife; OREL BUSBY and HOPE BUSBY, his wife; GEORGE MILTON HILL; JENCY MARIE HILL; FLOYD HILL; BOOKER MEADERS; J. G. WITHERSPOON, OKLAHOMA STATE BANK, Ada, Oklahoma, a Corporation; MAY TATUM, also known as Mrs. J. M. Tatum; MYRTLE TATUM, now Riddell; CURTIS TATUM; RAYMOND TATUM; GRACE TATUM; BRICE HELEN TATUM, now Gregg; BETTY JO TATUM, now Davis; MARK TATUM, JR., a minor over fourteen years of age; ALONZO PERRY; and LUCILLE PERRY, now Hager, and UNITED STATES OF AMERICA,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit in this case has not been officially reported, but is included in the record and a copy of same is attached

to the petition for Writ of Certiorari and this brief in support thereof as an appendix. The District Court did not write an opinion.

II.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (28 U. S. C., Sec. 347).

2. The Petition for Writ of Certiorari is to obtain a review of the judgment and opinion of the Circuit Court of Appeals for the Tenth Circuit dated April 19, 1948.

3. This case involves the constitutionality of Section 1 of the Act of Congress of July 2, 1945 (59 Stat. 313), which is a question of Federal law which has not been, but should be decided by this Court.

4. The decision of the United States Circuit Court of Appeals for the Tenth Circuit in this case is probably in conflict with applicable decisions of this Court. *Sunderland* v. *U. S.*, 266 U. S. 226, 69 L. Ed. 259, 45 Sup. Ct. 64; *Marx* v. *Hanthorn*, 148 U. S. 172, 37 L. Ed. 410, 13 Sup. Ct. 508; *Felix* v. *Patrick*, 145 U. S. 317, 36 L. Ed. 719, 12 Sup. Ct. 852; *Choate* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 741, 32 Sup. Ct. 565; *Smith* v. *Stephens*, 77 U. S., 10 Wall. 321, 19 L. Ed. 933.

5. The decision of the Circuit Court of Appeals for the Tenth Circuit in this case is probably in conflict with prior decisions of that court as to the nature of the restrictions on alienation which existed on the land involved in

the hands of the grantor in the deed dated November 17, 1932, which is alleged by petitioner to be void. *U. S.* v. *Williams*, 139 Fed. (2d) 183, *cert.* denied—*Williams* v. *U. S.*, 322 U. S. 727; rehearing denied, 322 U. S. 770; *U. S.* v. *Watashe*, 102 Fed. (2d) 428; *U. S.* v. *Brown*, 8 Fed. (2d) 564; *U. S.* v. *Law*, 250 Fed. 218.

III.

STATEMENT OF THE CASE

A concise statement of the case is set out in the petition for Writ of Certiorari filed herewith, and in order to be brief, it is not included in this brief.

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in finding and holding that the first section of the Act of Congress of July 2, 1945, Public Law 116, 79th Congress, 59 Stat. 313, validated the deed from plaintiff's devisor, Lucy Harjo, to W. M. Pegg dated November 17, 1932.

2. The Circuit Court of Appeals erred in holding that the first section of the Act of Congress of July 2, 1945, Public Law 116, 79th Congress, 59 Stat. 313, is constitutional as applied to petitioner's rights in this case.

3. The Circuit Court of Appeals erred in finding and holding that the title of petitioner was subject to being cut off by the Curative Act (Section One, Act of July 2, 1945, 59 Stat. 313) and that Congress could thereby transfer the title to the land involved from this petitioner to the respondents.

4. The Circuit Court of Appeals erred in not holding that the deed from Lucy Harjo to W. M. Pegg dated November 17, 1932, was absolutely null and void and that it could not be validated as against petitioner's vested rights by the first section of the Act of Congress of July 2, 1945 (59 Stat. 313).

5. The Circuit Court of Appeals erred in not holding that a deed which was executed by this petitioner to the respondent, Orel Busby, dated July 27, 1936, covering a small parcel of the land involved, was void and ineffective.

6. The Circuit Court of Appeals erred in not reversing the judgment of the District Court and in not remanding the case to the District Court with directions to render judgment for petitioner (plaintiff in the District Court) for the relief sought by her.

Petitioner states that said questions properly appear in the record and were raised before the trial court and the Circuit Court of Appeals.

V.

ARGUMENT

The Circuit Court of Appeals erred in holding that the first section of the Act of Congress of July 2, 1945, 59 Stat. 313, validated the deed from plaintiff's devisor, Lucy Harjo, to W. M. Pegg, dated November 17, 1932.

The different specifications of error are so interrelated that the argument under all the specifications of error can be presented in this brief under the proposition advanced in Specification of Error No. 1.

Under the treaties and Acts of Congress providing for the enrollment of members of the Choctaw and Chickasaw Nations and the allotment in severalty of their lands (Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 641), the plaintiff's mother, Lucy Harjo, was enrolled as a full blood Chickasaw Indian opposite Roll No. 571 of the Roll of the Chickasaws by blood and received an allotment, the alienation of which was restricted under the Acts of Congress (R. 295, 299). The plaintiff, Mattie McElroy, *nee* Harjo, was enrolled on the final roll of Chickasaw Indians by blood opposite Roll No. 575 as of one-half blood (R. 299). Lucy Harjo had been married to a full blood Seminole Indian who was the plaintiff's father and the plaintiff is actually a full blood Indian although enrolled on the Chickasaw Roll as of one-half degree of Indian blood (R. 116). Oil was produced from the restricted allotment of Lucy Harjo and from oil royalties which were under the control of the Secretary of the Interior, the land involved in this case was purchased for said Lucy Harjo and the deed to her was on a special form which has been referred to as a Carney Lacher form of deed (R. 244).

The Act of April 21, 1904 (33 Stat. 189), provided in part:

> "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes. except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe,

upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

The Act of May 27, 1908 (35 Stat. 312), provided in part in Section 1 thereof as follows:

"All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

Section 5 of the Act of May 27, 1908, provided:

"*Effect of Attempted Alienation of Restricted Land.* (Sec. 5.) That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

Pursuant to authority delegated to the Secretary of the Interior by the Act of May 27, 1908, the Secretary promulgated regulations for the purchase of lands for Indians of the Five Civilized Tribes with restricted money held under the control of the Department of the Interior as proceeds or profits of restricted land and therein prescribed in Regulation 20 a form of deed. The deed which was executed to Lucy Harjo for the land involved herein was on the form prescribed by such regulations (R. 244).

The first section of the Act of July 2, 1945 (59 Stat. 313), which we attack in this case, is as follows:

"Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no conveyance made by an Indian of the Five Civilized Tribes on or after April 26, 1931, and prior to the date of enactment of this Act, of lands purchased, prior to April 26, 1931, for the use and benefit of such Indian with funds derived from the sale of, or as income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931,

shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior: Provided, That all such conveyances made after the date of the enactment of this Act must have the consent and approval of the Secretary of the Interior: *Provided further* That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such conveyances shall not be affected by this section."

Section 4 of the Act provides:

"Sec. 4. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby."

It had been provided in the Act of Congress of April 26, 1906, 34 Stat. 137, that restrictions on alienation should continue for a period of 25 years from and after the passage and approval of that Act.

The Act of Congress of May 10, 1928, 45 Stat. 495, extended the restrictions for an additional period of 25 years commencing on April 26, 1931. Section 1 of the Act of May 10, 1928, provided:

"That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: *Provided*, That the Secretary of the Interior shall have the authority to remove the restrictions, upon the

applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

The lands involved herein were subject to the same restrictions as allotted lands. *Sunderland* v. *U. S.*, 266 U. S. 226, 69 L. Ed. 256, 45 Sup. Ct. 64; *U. S.* v. *Law*, 250 Fed. 218; *U. S.* v. *Brown*, 8 Fed. (2d) 564; *U. S.* v. *Watashe*, 102 Fed. (2d) 428.

Under the decision of the Circuit Court of Appeals in the case of *United States* v. *Williams*, 139 Fed. (2d) 183, cert. denied, *Williams* v. *U. S.*, 322 U. S. 727, rehearing denied, 322 U. S. 770, the lands involved herein constituted "lands allotted to members of the Five Civilized Tribes" as that phrase is used in Section 1 of the Act of May 10, 1928, and the restrictions thereon were extended for 25 years from and after April 26, 1931, and the deed by Lucy Harjo to W. M. Pegg dated November 17, 1932, was absolutely void. The evidence showed the transaction by which the deed was obtained from her was such that any well meaning public official would never have given his consent and approval to the deed and that the entire purpose of the restrictions was disregarded by the attempted Curative Act (Sec. 1 of the Act of July 2, 1945, 59 Stat. 313).

It has been argued and the Circuit Court of Appeals stated in its opinion that the deed by Lucy Harjo to W. M. Pegg could have been approved by the Secretary of the Interior after the death of Lucy Harjo which occurred in 1938, and that such approval would have related back and

would have cut off the rights of the petitioner herein as devisee of Lucy Harjo. The correctness or incorrectness of that assertion depends upon whether the restrictions which were on this land in the hands of Lucy Harjo were of the same kind as the restrictions involved in the cases of *Pickering* v. *Lomax*, 145 U. S. 310, 36 L. Ed. 716, 12 Sup. Ct. 860, and *Lykins* v. *McGrath*, 184 U. S. 168, 46 L. Ed. 485, 22 Sup. Ct. 450. It is our contention that the treaties and laws construed in those cases did not make the authorization of the President or Secretary of the Interior a condition precedent to the power of the allottee to convey, but only made their subsequent approval necessary to make the conveyances effective. See *Murrow Indians Orphan Home* v. *McClendon*, 64 Okla. 205, 166 Pac. 1101, which clearly shows the difference between the procedure required for removal of restrictions where removal of restrictions is a condition precedent to the power of the allottee to convey and that required in a case where the approval of the conveyance may be made after its execution and delivery. The Circuit Court of Appeals had previously construed the restrictions imposed by a Carney Lacher deed such as is involved herein to be such as to require removal of restrictions as a condition precedent to the power of the grantee in such a deed to convey the land in the case of *U. S.* v. *Watashe*, 102 Fed. (2d) 428. In the case of *Pickering* v. *Lomax, supra*, the trial court's opinion was reversed and it was stated that the trial court was of the opinion "that Robinson had no authority to convey without obtaining the permission of the President beforehand." We now make a similar contention in regard to the authority of Lucy Harjo to convey this land, on the ground the restrictions

involved herein are different. The restrictive clause in the deed to Lucy Harjo prohibited any conveyance of the land by her *"unless made with the consent of* and approved by *the Secretary of the Interior"* and stated that any conveyance, unless made with such consent and approval, should be of no force and effect and should not be capable of confirmation or ratification. This distinguishes the case at bar from those authorities and from cases construing the power of a County Court to approve a conveyance of land by a full blood Indian heir under Section 9 of the Act of Congress of May 27, 1908, *supra*, and from cases relating to authority of the Secretary of the Interior to approve an oil and gas lease.

By the wording of the restrictive clause itself and the provision in the Act of 1908, *supra*, as to the effect of a deed executed in violation of restrictions, the deed to W. M. Pegg by Lucy Harjo was void and not subject to confirmation or ratification. The restrictive clause in the deed to Lucy Harjo required not only the approval by the Secretary of any conveyance by her, but required that it be made with the consent of the Secretary of the Interior, that is, it was necessary that he give his consent and approval before final delivery of the deed, and, furthermore, it having been intended that this land be subject to the same restrictions as allotted land, and being allotted land within the meaning of the Act of May 10, 1928, *supra*, it is our further contention that the proviso of the first section of the Act of May 10, 1928, *supra*, applies, and it was necessary that any removal of restrictions on the land involved be made

upon the application of the Indian owner, and that the removal of restrictions was a condition precedent to the power of Lucy Harjo to convey the land by deed.

The evidence showed that the grantee never intended to attempt to obtain an approval of the deed (R. 187, 188). That places the respondents in the position of the party whose deed was held void in the case of *Canfield* v. *Jack*, 78 Okla. 127, 188 Pac. 1040, *cert.* denied, 253 U. S. 493, 64 L. Ed. 1029, 40 Sup. Ct. 586. See the sixth paragraph of the syllabus by the Court in that case.

Lucy Harjo was given the right to convey the land involved herein by her will by Section 23 of the Act of Congress of April 26, 1906, 34 Stat. 137, as amended by Section 8 of the Act of Congress of May 27, 1908, 35 Stat. 312, and she conveyed the same in a manner authorized by law to the plaintiff herein, that is, by approved will. There were two methods by which she could convey it. One was by approved deed upon removal of restrictions and the other by will. The only legal method she exercised was by will, so the first section of the Act of Congress of July 2, 1945, 59 Stat. 313, is unconstitutional as applied to petitioner, in that it attempts to transfer the petitioner's property to the respondents.

Attempted curative acts such as the one involved herein were held invalid or ineffective in the case of *Felix* v. *Patrick*, 145 U. S. 317, 36 L. Ed. 719, 12 Sup. Ct. 852, and in *Stephens* v. *Smith* (77 U. S.), 10 Wallace, 321, 19 L. Ed. 933.

The third section of the Act of July 2, 1945, which was intended to validate judgments in partition suits in cases

where the United States had not been made a party, was held to be constitutional in the case of *Goddard* v. *Frazier*, 156 Fed. (2d) 938, *cert.* denied, 329 U. S. 765, 91 L. Ed. 659, 67 Sup. Ct. 124, but the first section of said Act relates to an entirely different subject and the authority of the Legislature to cure defects in judicial proceedings is controlled by an entirely different line of authorities than those relating to the power of the Legislature to cure defects in deeds. The citation in the opinion of the Circuit Court of Appeals in this case from Cooley on Constitutional Limitations, 8th Edition, Vol. II, p. 775, is not applicable, we contend, to the situation involved in this case as may be seen by referring to page 776 of the same volume in the note wherein cases are cited holding that a curative act which attempts to take away property rights already vested is void, including the case of *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338, 66 L. Ed. 647, 42 Sup. Ct. 325. It has been held that a statute cannot cure an absolutely void deed, 16 C. J. S., Constitutional Law, Sec. 434, p. 884, and that a statute in the form of a curative act is void if it attempts to impair vested rights, 16 C. J. S., Constitutional Law, Sec. 421, p. 876. See *Maguiar* v. *Henry*, 84 Ky. 1; *Shonk* v. *Brown*, 61 Pa. 320.

It will be our contention that the cases cited in the opinion of the Circuit Court of Appeals in this case following the last note to the opinion have no application whatever because no equitable rights were acquired by W. M. Pegg or any one by reason of the deed to him by Lucy Harjo dated November 17, 1932. It was absolutely

null and void and not subject to confirmation or ratification, according to all law previously written regarding the effect of a deed executed in violation of such regulations.

When, on a person's death, the rights of his heirs, devisees, or legatees have thereby become vested, these rights may not be impaired by subsequent legislation. (16 C. J. S., Const. Law, Sec. 228, p. 655).

CONCLUSION

It is therefore respectfully submitted that the questions involved in this case are such as to justify this Court in granting a Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit in order that its opinion and decision may be reviewed and that this Court should review the decision of the Circuit Court of Appeals and reverse it.

Respectfully submitted,

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Of Counsel:

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Ada, Oklahoma.

June, 1948.

APPENDIX

United States Circuit Court of Appeals
TENTH CIRCUIT.

No. 3561—NOVEMBER TERM, 1947.

Mattie McElroy, nee Harjo,
Appellant,

v.

W. M. Pegg; Charles S. Szenasi and Lenna Szenasi, his wife; W. A. Beam and Effie Beam, his wife; Hendrix McMillan and Lonie McMillan, his wife; Orel Busby and Hope Busby, his wife; George Milton Hill; Jency Marie Hill; Floyd Hill; Booker Meaders; J. G. Witherspoon, Oklahoma State Bank, Ada, Oklahoma, a corporation; May Tatum, also known as Mrs. J. M. Tatum; Myrtle Tatum, now Riddell; Curtis Tatum; Raymond Tatum; Grace Tatum; Brice Helen Tatum, now Gregg; Betty Jo Tatum, now Davis; Mark Tatum, Jr., a minor over fourteen years of age; Alonzo Perry; and Lucille Perry, now Hager,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

[April 19, 1948.]

Carloss *Waldington* (Turner M. King was with him on the brief) for appellant.

[APPENDIX]

A. W. Trice (Orel Busby, L. H. Harrell, C. L. McArthur, Hobert G. Orton, Thomas P. Holt, Warren B. Kice, Vernon Roberts, Atty. and Guardian ad litem for Mark Tatum, a minor, were with him on the brief) for appellees.

Before PHILLIPS, BRATTON, and MURRAH, Circuit Judges.

PHILLIPS, Circuit Judge, delivered the opinion of the court.

Mattie McElroy, nee Harjo, brought this action to quiet the title to a tract of land containing nine acres, situated in Pontotoc County, Oklahoma, and to recover the possession of that portion of such land not in the possession of McElroy.

On October 20, 1919, N. B. Haney, Jr., and Carrie M. Haney, his wife, conveyed a ten-acre tract of land to Lucy Harjo by a Carney-Lachey form of deed. The land was purchased with restricted funds of Harjo and the deed contained a provision restricting alienation thereof by Harjo, except with the consent and approval of the Secretary of the Interior. On September 15, 1928, Harjo, by warranty deed, conveyed to Fred L. Lynn one acre out of such tract of land. That deed was approved by the Secretary of the Interior. On November 17, 1932, Harjo, by warranty deed, conveyed the remaining portion of such land to W. M. Pegg. That deed was not approved by the Secretary of the Interior.

The consideration for the conveyance to Pegg was $500 in cash and the conveyance by Pegg to Harjo, by warranty deed, of a 40-acre tract of land situate in Pontotoc County, Oklahoma. The 40-acre tract adjoined Harjo's allotment. On January 30, 1933, Pegg and Nettie J. Pegg, his wife, by warranty deed, conveyed to McElroy a one and one-eighth-acre parcel of the land acquired by Pegg from Harjo. Such parcel of land was occupied by McElroy.

The conveyance was made pursuant to an agreement between Pegg and Harjo. No consideration was paid therefor by McElroy. On July 27, 1936, McElroy, by warranty deed, conveyed a parcel of the one and one-eighth-acre tract to appellee, Orel Busby.

Except the parcel conveyed by McElroy to Busby, appellees, other than Pegg, claim through mesne conveyance from Pegg made between February 18, 1933, and September 21, 1946.

McElroy was present, assisted, and advised Harjo at the time the deed was made from Harjo to Pegg and was fully cognizant that it was made without the approval of the Secretary of the Interior.

As grounds for relief, McElroy set up that the deed from Harjo to Pegg was void because it was not approved by the Secretary of the Interior; that Harjo was incompetent at the time of the execution of such conveyance; that Harjo had been adjudged incompetent in a guardianship proceeding in the county court of Pontotoc County, Oklahoma, and had not been restored to competency; that the consideration for the conveyance by Harjo to Pegg was grossly inadequate; that Harjo died testate on December 26, 1938; and that the land passed to McElroy by the residuary clause of Harjo's will.

The appellees answered and set up their respective claims of title and that each of them had made valuable improvements on the tracts of land conveyed to them prior to the commencement of the instant action.

On October 23, 1918, N. S. Olivo filed a petition in the county court of Pontotoc Sounty, Oklahoma, for the appointment of a guardian for Harjo in which the petitioner alleged that Harjo was an incompetent.

[APPENDIX]

58 Okl. St. Ann., § § 851 and 852, provide:

"§ 851. Petitions for guardians of incompetent or insane persons—Notice.—When it is represented to the county court upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing."

"§ 852. Guardian appointed, when.—If after a full hearing and examination upon such petition, it appears to the judge of the county court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article specified."

The record of the guardianship proceedings shows that the county court entered an order setting the petition for hearing on November 7, 1918, and directed that notice thereof be given by service of notice on Harjo, and the posting in three public places in Pontotoc County, and further shows that notice of the application for an appointment of a guardian was issued on October 23, 1918. It does not disclose that the notice was personally served on Harjo.

On November 7, 1918, the county court of Pontotoc County entered an order appointing N. S. Olivo as the guardian of Harjo. It recited that notice of the hearing was given by posting the notice of application for the appointment of a guardian in three public places in Pontotoc County, Oklahoma. It did not recite that the notice was personally served on Harjo. It recited that Harjo ap-

peared in person. It found that Harjo desired the appointment of Olivo as her guardian but did not find or adjudge that Harjo was incompetent or incapable of taking care of herself or managing her property.

This action was commenced October 8, 1946. Notice was served upon the Superintendent for the Five Civilized Tribes, pursuant to § 3 of the Act of April 12, 1926, 44 Stat., Part 2, Ch. 115, p. 240. The United States filed a complaint in intervention in which it sought a cancellation of the deed from Harjo to Pegg on the grounds set up in McElroy's complaint.

The trial court found that the order appointing Olivo guardian of Harjo was void because (1) notice of application for appointment was not personally served upon Harjo and (2) that there was no finding or adjudication that Harjo was incompetent; that Harjo was not incompetent in fact at the time of the execution of the deed from her to Pegg; that the evidence failed to establish any fraud in the procurement of the deed from Harjo to Pegg; and that the consideration paid by Pegg to Harjo was not inadequate.

It concluded that the want of approval by the Secretary of the Interior of the deed from Harjo to Pegg was cured by the Act of July 2 1945, Public Law 116, 79th Congress, 59 Stat. 313.

From an adverse judgment, McElroy has appealed. The United States did not join in such appeal.

The findings with respect to the issues of the incompetency in fact and the inadequacy of the consideration are supported by substantial evidence and are not clearly erroneous. They are binding on this court.[1]

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[1] **North American Acc. Ins. Co. v. Allentharp** (10 Cir.), 161 Fed. (2d) 9, 11.

[APPENDIX]

In the case of In re Mize's Guardianship, 196 Okl. 164, 142 P. 2d 116, an order had been made appointing a guardian for Elnora Mize, an alleged incompetent. The record did not disclose that personal service was made upon Elnora Mize. She personally appeared at the hearing on the petition for the appointment of the guardian and had joined in such petition. The court held that § 851, supra, requires that notice of the time and place of the hearing shall be served personally upon the alleged incompetent not less than five days before the time appointed for the hearing, that failure to personally serve notice was not cured by the personal appearance of the alleged incompetent at the hearing, and that the order of appointment was void. In Martin v. O'Reilly, 81 Okl. 261, 200 P. 686, the court held that the requirement that notice of the hearing on the application for the appointment of a guardian be personally served upon the alleged incompetent was jurisdictional and that an order appointing a guardian where no personal service was made upon the alleged incompetent, was void and subject to collateral attack. In Colby v. Jacobs, 179 Okl. 170, 64 P. 2d 881, the court held that the requirement that notice of the hearing on the application be personally served upon the alleged incompetent was jurisdictional and, without the service of such notice, the court acquired no jurisdiction to make an adjudication of incompetency or to appoint a guardian.

Here, there was no showing of personal service upon Harjo and it was a reasonable inference from the recitals in the order of appointment that notice was not personally served upon Harjo. Moreover, the order of appointment did not find or adjudge the statutory grounds for the appointment of the guardian.

It follows that the order appointing a guardian for Harjo was void and created no presumption of the incompetency of Harjo.

Section 1 of the Act of July 2, 1945, supra, in part reads:

> "That no conveyance made by an Indian of the Five Civilized Tribes on or after April 26, 1931, and prior to the date of enactment of this Act, of lands purchased, prior to April 26, 1931, for the use and benefit of such Indian with funds derived from the sale of, or as income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931, shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior."

In Goddard v. Frazier, 10 Cir., 156 F. 2d 938, we held that § 3 of the Act of July 2, 1945, supra,[2] was valid and constitutional.

The restriction against alienation without approval of the Secretary of the Interior in the habendum clause in the deed from the Haneys to Harjo was imposed by virtue of Regulation 20[3] promulgated by the Secretary of

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[2] Section 3 of such Act reads:

"That no order, judgment, or decree in partition made, entered, or rendered subsequent to the effective date of the Act of June 14, 1918 (40 Stat., 606), and prior to the effective date of this Act, and involving inherited restricted lands of enrolled and unenrolled members of the Five Civilized Tribes, shall be held null, void, invalid, or inoperative, nor shall any conveyance of any land pursuant to such order, judgment, or decree be held null, void, invalid, or inoperative because the United States was not a party to such order, judgment, or decree, or to any of the proceedings in connection therewith, or because the United States, its agents or officers, or any of them, was not served with any notice or process in connection therewith, and all such orders, judgments, decrees, and conveyances, which are subject to attack solely by reason of any of the infirmities enumerated by this section, are hereby confirmed, approved, and declared valid."

[3] C.F.R., Title 25, Sec. 241.44.

the Interior, pursuant to § 1 of the Act of May 27, 1908, 35 Stat. 312. The validity of that Regulation has been settled by repeated adjudications.[4]

Congress has plenary power to impose, continue, remove, qualify, or reimpose restrictions with respect to the conveyance of Indian lands.[5]

The Secretary of the Interior could have approved the conveyance from Harjo to Pegg after the death of Harjo and such approval would have related back to the date of the deed and would have cut off the rights of McElroy under Harjo's will.[6]

Regulation 20, supra, has the force and effect of law.[7]

Congress, by curative statute, could validate anything it might have authorized previously, or make immaterial anything it might have omitted from a previous enactment. Mr. Cooley, in his work on Constitutional Limitations, 8th Ed., Vol. II, p. 775, states the rule thus: "If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed

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4 **Sunderland v. United States** (8 Cir.), 287 Fed. 468, 471; Id., 266 U. S. 226, 234, 235;

Board of County Commissioners v. Seber, 318 U. S. 705, 710, note 3, p. 708;

United States v. Brown (8 Cir.), 8 Fed. (2d) 564, 565;

Hass v. United States (8 Cir.), 17 Fed. (2d) 894, 896.

5 **United States v. Getzelman** (10 Cir.), 89 Fed. (2d) 531, 536; **Taylor v. Tayrien** (10 Cir.), 51 Fed. (2d) 884, 887; **State of Oklahoma v. United States** (10 Cir.), 155 Fed. (2d) 493, 499.

6 **Lykins v. McGrath,** 184 U. S. 169, 171, 172;

United States v. Getzelman (10 Cir.), 89 Fed. (2d) 531, 535.

See, also, **Lomax v. Pickering,** 173 U. S. 26; **Hampton v. Ewert** (8 Cir.), 22 Fed. (2d) 81, 90, 91.

7 **Regents of New Mexico v. Albuquerque Broadcasting Co.** (10 Cir.), 158 Fed. (2d) 900, 906.

with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." The rule stated by Cooley was approved in Mattingly v. District of Columbia, 97 U. S. 687.[8]

Congress, under its plenary power, could have provided that lands purchased with restricted funds of a member of the Five Civilized Tribes and conveyed to such member could be conveyed by such member without the approval of the Secretary of the Interior. Acting through the Secretary of the Interior, by virtue of its delegation of power to the Secretary, Congress provided that lands so purchased could not be conveyed by the grantee except with the approval of the Secretary of the Interior. Since it could have omitted that requirement in the first instance, Congress had power by a curative statute to make the lack of such approval immaterial and to validate deeds made without such approval.[9]

While McElroy took as devisee under the will of Harjo as an instrument of conveyance and not by descent as an heir,[10] she was in no sense an innocent purchaser for value. She knew the deed from Harjo to Pegg had not been approved by the Secretary of the Interior. She paid no value. She accepted from Pegg a conveyance of the portion of the land included in the deed from Harjo to Pegg. She merely succeeded to Harjo's rights which were subject to

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[8] See, also, **Goddard v. Frazier** (10 Cir.), 156 Fed. (2d) 938, 941.

[9] **Goddard v. Frazier** (10 Cir.), 156 Fed. (2d) 938, 941; **Mattingly v. District of Columbia**, 97 U. S. 687.

[10] **Copeland v. Johnson**, 101 Okla. 228, 224 Pac. 986, 989; **La Motte v. United States**, 254 U. S. 570, 579.

being cut off by the approval of the deed by the Secretary of the Interior, or by Congressional enactment rendering such approval unnecessary.[11]

Accordingly, we conclude that § 1 of the Act of July 2, 1945, is constitutional.

The judgment is AFFIRMED.

A true copy.

Attest:

Clerk, U. S. Circuit Court of Appeals, Tenth Circuit.

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11 **Spencer v. Lewis** (La.), 1 So. 671, 672;
Bradshaw v. Nightower (N. C.), 24 S. E. 120, 122;
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No. 99

FILED
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Supreme Court of the United States

OCTOBER TERM, 1948

MATTIE McELROY,
Petitioner,

VERSUS

W. M. PEOG ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION

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Ada, Oklahoma.

July, 1948.

STEINBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY 4, OKLAHOMA

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No. 99

Supreme Court of the United States

OCTOBER TERM, 1948

MATTIE MCELROY,
Petitioner,

VERSUS

W. M. PEGG ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. Its findings of fact, conclusions of law, and its judgment appear in the record at pages 75-77, 77-79, and 79-82, respectively. The opinion of the Circuit Court of Appeals (R. 341-348) is reported at 167 Fed. (2d) 668.

QUESTION PRESENTED

Whether the Act of July 2, 1945, 59 Stat. 313 (Public Law 116, 79th Congress), is constitutional.

STATEMENT

Petitioner McElroy, in the trial court and in the Circuit Court of Appeals, sought to recover land on a number of grounds involving both facts and law.

Among the fact questions urged was inadequacy of consideration and the overreaching of Lucy Harjo in her deed to Pegg. The learned trial judge held that there was no fraud perpetrated upon Harjo, that there was no inadequacy of consideration. The Circuit Court affirmed the findings of the trial court, and observed that while McElroy took as a devisee under the will of Harjo as an instrument of conveyance and not by descent as an heir, she was in no sense an innocent purchaser for value; that she paid no value. The Appellate Court further observed that McElroy knew the deed from Harjo to Pegg had not been approved by the Secretary of the Interior; that she accepted from Pegg a conveyance of a portion of the land included in the deed from Harjo to Pegg; and that McElroy merely succeeded to Harjo's rights which were subject to being cut off by the approval of the deed by the Secretary of the Interior, or by congressional enactment rendering such approval unnecessary.

The pleadings (R. 250) and the evidence (R. 119-120) show that McElroy signed her mother's (Harjo's) name to the deed she seeks to cancel, participated in the original transaction and procured title to a portion of the land from Pegg (R. 260 and 317) and (R. 120). Hence it should be noted from the outset that equity and justice in this case are on the side of the respondents.

Neither the trial court nor the Circuit Court deemed it necessary to discuss or refer to those defenses interposed by the respondents against the petitioner as to laches, estoppel, failure to make restoration, or the applicable statutes of limitation. Both courts were content to settle the issues in favor of the respondents on the facts, the legal interpretation of the applicable Federal statute and the interpretations thereof by the Federal courts. Both courts held that the Act of July 2, 1945, Public Law 116, the Federal statute involved in the case at bar is constitutional.

We wish to emphasize the reasoning of the courts as set out in the case of *Goddard* v. *Frazier*, 156 Fed. (2d) 938-941 (*certiorari* denied October 28, 1946, 329 U. S. 765), involving Public Law 116, which is the curative act in question here. It was there observed that courts do not regard rights as constitutionally protected which are contrary to the equity and justice of the case; that when the intent of a curative act is to achieve a result which will be recognized in a court of equity, a greater presumption of validity attaches to it and it should be liberally construed to effectuate the salutary purpose. As found by the trial and appellate courts, equity in the case at bar was on the side of the respondents.

It should also be noted that the United States was brought into this case in the trial court by the petitioner, but that the United States did not join in the appeal to the Circuit Court after an adverse decision to petitioner. Nor has the United States joined in this application for Writ of Certiorari. This indicates that the attorneys for the United States Government, who are zealous in their

defense of property rights of Indians where either the facts or legal decisions involve such rights, are not concerning themselves with the results and interpretations of the trial and appellate courts in the case at bar.

ARGUMENT AND AUTHORITIES

The correct rules of law on the questions raised and argued by petitioner can be stated as follows:

(a) The Act of July 2, 1945, Public Law 116, is constitutional. *Frazier* v. *Goddard*, 63 Fed. Supp. 698; *Goddard* v. *Frazier*, 156 Fed. (2d) 938. (*Certiorari* denied, October 28, 1946, 329 U. S. 765).

(b) The deed from Lucy Harjo to W. M. Pegg, dated November 17, 1932, could have been approved, and thereby validated, by the Secretary of Interior at any time, either before or after the death of Lucy Harjo. *Lykins* v. *McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485; *Anchor Oil Co.* v. *Gray*, 256 U. S. 519, 60 L. Ed. 1070; *Jones* v. *Merfeldt*, 167 Okla. 520, 30 Pac. (2d) 924; *Scioto Oil Co.* v. *O'Hern*, 67 Okla. 106, 169 Pac. 483; *Gilbert* v. *Gaines*, 169 Okla. 5, 35 Pac. (2d) 911.

(c) Congress could have authorized Lucy Harjo and Indians of her class to convey the land involved and other lands so acquired, with the approval of the Secretary of Interior or of any other governmental agency. Or, Congress could have omitted or refrained from placing any restrictions on such land. Or, could have omitted to extend restrictions on such land beyond April 26, 1931. In fact practically the entire membership of the Oklahoma Bar familiar with Indian litigation believed for many years that Congress had omitted to extend such restrictions under the 1928 Act

until the case of *U. S.* v. *Williams*, 139 Fed. (2d) 83, was decided by the United States Circuit Court for the Tenth Circuit. It was after this decision that Congress passed the curative act in question known as Public Law 116 or the Curative Act of July 2, 1945 (50 U. S. Stat. 313).

It follows that Congress had the power to validate the deeds of Lucy Harjo and others in the same situation, without the approval of the Secretary of Interior, and the Act of July 2, 1945, was not in violation of the Fifth Amendment to the Constitution. *Frazier* v. *Goddard, supra; Goddard* v. *Frazier, supra.*

In *Frazier* v. *Goddard, supra*, the trial court had under consideration Section 3 of the Act, *supra*. Sections 1, 2 and 3, however, from a legal standpoint all fall in the same category. Each section is a curative act as to a separate question affecting Indian land titles in Oklahoma. If one section is invalid, all are invalid; and the converse is, of course, true, *i. e.*, if one section is valid all three are valid.

The trial court in *Frazier* v. *Goddard, supra*, pointed out that the sole question to determine was whether or not the Act of Congress involved was valid or constitutional. The presumption, of course, is that all acts are constitutional, and a heavy burden is upon him who asserts unconstitutionality. *Bradley* v. *Richmond*, 227 U. S. 477, 33 Sup. Ct. 318, 57 L. Ed. 603; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Smeltzer* v. *St. Louis & S. F. R. Co.* (C. C. Ark.), 158 Fed. 649. The trial court referred to this Act as "Public Law 116," that it was an act to validate titles to certain lands conveyed to Indians of the Five Civilized Tribes and held that it was constitutional. The trial court

specifically pointed out that in passing Public Law 116 Congress was operating in a field wherein it had plenary power; that it was operating in a field in which Congress was supreme. *Brader* v. *James,* 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; *Tiger* v. *Western Investment Co.,* 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Winton* v. *Amos,* 255 U. S. 373, 41 Sup. Ct. 342, 65 L. Ed. 684; *United States* v. *Sandoval,* 231 U. S. 28, 34 Sup. Ct. 1, 58 L. Ed. 107; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041; *Lone Wolfe* v. *Hitchcock,* 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed.; *United States* v. *Hellard,* 322 U. S. 363, 64 Sup. Ct. 985, 88 L. Ed. 1326. The trial court then stated (page 699): "My conclusion is that Public Law No. 116 is constitutional."

In the same opinion (page 700) an analysis and application is made of the cases of *Pickering* v. *Lomax,* 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716, and *Lykins* v. *McGrath,* 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485. Petitioner refers to and criticizes both of these cases in her petition for Writ of Certiorari. These cases are wholly contrary to the contentions of the petitioner.

Frazier v. *Goddard, supra,* was appealed to the United States Circuit Court of Appeals, Tenth Circuit, and affirmed on July 10, 1946, as *Goddard* v. *Frazier,* 156 Fed. (2d) 938. The Appellate Court (page 941) discussed the test for determining the validity of curative statutes and referred to the established rule that "a Legislature may validate by subsequent act anything it might have authorized previously or may make immaterial anything it might have omitted in the original act." Sutherland Statutory Construction, 3rd Ed., Sec. 2206; Cooley on Constitutional Limi-

tations, 8th Ed., p. 776; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1012; *United States* v. *Heinszen & Co.*, 206 U. S. 370, 387, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688; *Chicago, R. I. & P. R. Co.* v. *Austin*, 63 Okla. 169, 163 Pac. 517, L. R. A. 1917D, 666.

A petition for Writ of Certiorari was filed in the Supreme Court of the United States after the *Goddard* v. *Frazier* decision, *supra*, became final and the writ was denied on October 28, 1946, 329 U. S. 765.

It will thus be seen that a United States District Court for this district has determined that Public Law 116, or the Act of July 2, 1945, is constitutional; the United States Circuit Court for the Tenth Circuit affirmed this decision; and this Court denied Writ of Certiorari. Therefore, the legal question involved herein, to-wit, the constitutionality of Public Law 116, or the Curative Act of July 2, 1945, has been fully and finally determined and there is no substance to this appeal.

Further answering petitioner's contentions we desire to point out that the restriction on Lucy Harjo against the alienation of the particular land involved rests primarily upon the restriction in the deed of October 20, 1919, from N. B. Haney, Jr., and wife to Harjo (R. 244-245). That restriction in substance is as follows:

> "That any deed to this land 'executed during the lifetime of such grantee at any time prior to April 26, 1931, shall be of no force and effect or capable of confirmation or ratification unless made with the consent of and approval by the Secretary of the Interior."

Pegg obtained his deed from Harjo on November 17, 1932 (R. 249, 250).

In the case of *United States* v. *Williams, supra* (December 13, 1943), it was determined by the United States Circuit Court of Appeals for the Tenth Circuit that Congress had (1) the power to impose the restrictions on alienation of lands by full blood Indians for a certain period of time, and (2) the power to extend the period of restriction against alienation, and (3) that the Act of 1928 extended such restrictions for an additional 25 years from April 26, 1931. The *Williams* case thus held that this extension would apply to the Harjo land in question.

Under the reasoning of the courts in *Frazier* v. *Goddard* and *Goddard* v. *Frazier, supra,* and in the decision herein sought to be appealed from, Congress had the power to validate any deeds made without the approval of any governmental agency as provided by former Acts. Section 1 of the Act of July 2, 1945 (Public Law 116) is as follows:

> "That no conveyance made by an Indian of the Five Civilized Tribes on or after April 26, 1931, and prior to the date of the enactment of this Act, of lands purchased, prior to April 26, 1931, for the use and benefit of such Indian with funds derived from the sale of, or as income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931, shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior: PROVIDED, That all such conveyances made after the date of the enactment of this Act must have the consent and approval of the Secretary of the In-

terior: Provided Further, That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such conveyances shall not be affected by this section."

Thus, by the passage of the Act of July 2, 1945, Congress validated the deed from Harjo to Pegg.

The two decisions in the *Frazier-Goddard* cases nullify the argument of petitioner at pages 21 and 22 of her petition and brief, to the effect that the deed from Lucy Harjo to Pegg was void and not subject to confirmation for the reasons (1) that the approval by the Secretary was necessary in advance of Harjo's execution of this deed, and (2) that the restrictions could only be removed on the application of Harjo.

Petitioner urges, however, that particular circumstances place her in a position to which this rule of law would not apply. This for the reason that petitioner acquired whatever interest she might have in this land as residuary devisee prior to the passage of the validating act, that she thereby acquired a title which Congress could not take away from her.

Petitioner wholly overlooks the fact that she acquired whatever interest she might have in these lands as the residuary devisee of Harjo. Since the consideration for a residuary devise under a will is love and affection, petitioner is not in the realm of a bona fide purchaser for value or of an innocent purchaser for value. In *Copeland* v. *Johnson et al.*, 101 Okla. 228, 224 Pac. 986, the Court laid down the rule that a full blood Indian devisee takes under a will as an instrument of conveyance and not by descent as an heir.

Lamotte v. *United States*, 254 U. S. 570, 41 Sup. Ct. 204, 65 L. Ed. 410; *Stamm* v. *Bostwick*, 40 Hun. N. Y. 93; *Clark* v. *Strong*, 105 App. Div. 179, 93 N. Y. Supp. 514; 40 Cyc. 1995; 23 Am. & Eng. Enc. of Law (2d Ed.), Sec. 464.

Petitioner further overlooks the fact that she could not acquire any greater interest as a residuary devisee than that owned by Lucy Harjo at the time of her death. *Collins* v. *Collins* (Ariz.), 52 Pac. (2d) 1169, 1174.

Since petitioner takes from Harjo, if at all, as a purchaser, the general rule with reference to her right to attack a prior deed executed by Harjo on the same property is laid down by this Court in *Graham* v. *LaCrosse*, 102 U. S. 148, 26 L. Ed. 106. There the Court held that even though a deed was obtained from the grantor by fraudulent representations, it was not void but voidable only at the election of the grantor; that a subsequent purchaser from the grantor could not allege fraud of the first grantee to defeat the deed; that the right to attack the deed on the ground of fraud is not a right capable of sale and transfer; that such right is a mere personal right. The rule was stated in *Pluto Oil & Gas Co.* v. *Miller*, 95 Okla. 222, 219 Pac. 303, that where a party has waived or omitted to exercise the right to institute proceedings to recover lands of which he has been defrauded, such right does not inure to the benefit of subsequent creditors or purchasers. *Davis* v. *Robedaux*, 97 Okla. 86, 222 Pac. 990; *Davis* v. *Travis*, 175 Okla. 21, 52 Pac. (2d) 72.

Petitioner cites the case of *Felix* v. *Patrick*, 135 U. S. 317, 12 Sup. Ct. 852, 36 L. Ed. 719, but that case is not applicable to the fact situation here. There the Court found

that the title under which Patrick claimed had been obtained by various instruments which were fraudulent devices to evade the law and therefore expressed the opinion that if the action had been timely brought, the claimants of the original patentee could have recovered. In the case at bar the trial court has held that there was no fraud in obtaining the deed under which respondents claim, and the Circuit Court has affirmed the trial court's findings. This makes our case entirely different from *Felix* v. *Patrick, supra.* In that case, however, the United States Supreme Court sustained the title of Patrick upon the ground of laches and want of equity as the Sioux Indians claimants to the land had sat idly by for many years, as petitioner had in the case at bar, and had allowed innocent purchasers to acquire title to the land and make large expenditures thereon without any warning of the claims of those Indian heirs. The same character of laches and want of equity exists in the case at bar.

The case of *Canfield* v. *Jack,* 78 Okla. 121, 188 Pac. 1040, relied on by appellant, is not applicable to the facts in this case. There the first party who took a deed from Indian heirs delayed having the deed approved until after a second party had also taken a deed from the Indian heirs and had the same approved. We readily concede that the rule is firmly established in this jurisdiction that where two or more deeds are given by restricted Indians, the first deed to be approved by the proper approving agency becomes validated to the exclusion of the various other deeds given either before or after the approval deed.

In this case Harjo had given no second deed. Petitioner claims under the residuary clause contained in Harjo's will

executed on April 4, 1938. Harjo did not mention in her will the land involved in this action and by the residuary clause did not indicate any intent to convey this land. She did specifically devise the land she had acquired in the trade with Pegg. This indicated clearly that Harjo considered that she had parted with the title to the land sought to be recovered by petitioner. Petitioner as the residuary devisee does not stand in the position of an innocent purchaser for value, such as would have been the case of the holder under a second deed properly approved.

The case of *Shonk* v. *Brown*, 61 Pac. 320, cited by petitioner is not in the least applicable to the facts in this case. There the property was devised to a married woman by a will with absolute restrictions upon her alienation of the same during her lifetime. The legislative branch of the government did not and could not place that restriction on her alienation of the land. That restriction could only be placed thereon by the testator. Consequently, it follows that the legislative body could not validate her conveyance or remove the restriction against such a conveyance in violation of the terms of the devise in the will.

Petitioner relies heavily upon the case of *Murrow Indian Orphans' Home* v. *McClendon*, 64 Okla. 205, 166 Pac. 1101. In that case the Oklahoma Supreme Court was dealing with a restriction wholly different from the restriction involved in this case. Whether the Court was right, or not, it held that the Act of April 21, 1904, controlled in that case and that Act did not provide for the approval of deeds as does the applicable restriction in the case at bar. That Act provided only for removal of restrictions by the Sec-

retary of Interior upon recommendation of the Indian Agent. There the Court pointed out that the Secretary of the Interior under that Act had no power to approve a deed, but only the power to approve the recommendation of the Indian Agent that the restrictions be removed; that the Secretary's approval of a deed was entirely unauthorized and added no vitality whatever to the instrument.

The restriction in this case is a restriction of an entirely different character and the necessary approval by the Secretary of Interior is a consent to conveyance. The case here is controlled by the rule laid down by the Supreme Court of the United States in *Lykins* v. *McGrath*, *supra*. That case involved land patented to David Lykins, a member of the Peoria Tribe of Indians. The restriction contained in the patent was as follows: "That said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being." Lykins executed a deed to the land and died before the approval thereof by the Secretary. He left two heirs who brought suit in ejectment to recover possession of the land from the person in possession under said deed. The heirs made exactly the same contention there that petitioner makes in this case. They contended that the deed from Lykins not having been approved before his death became thereby an absolute nullity; that title to the land immediately vested in them free from any claim of the grantee to the land; that they never asked for approval by the Secretary, never consented that it should be given, never in any way ratified or acceded to the deed of their ancestor, and that the Secretary was without any authority after the death of the patentee to approve said deed.

In that case the Supreme Court discussed the case of *Pickering* v. *Lomax, supra.* In the *Pickering* case it was held that the final approval of a deed by the President some thirteen years after it was given related back to the date of the deed. Applying this holding to the *Lykins* case, *supra,* the Court stated: "It must therefore be considered as settled that the consent of the Secretary of the Interior to a conveyance by one holding under a patent like the present may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance."

Petitioner's contention as to any special right of petitioner in this case is completely answered by the United States Supreme Court in *Lykins* v. *McGrath, supra.* We quote from that opinion as the reasoning therein set out applies with greater force to the facts in this case than any argument we could make:

> "Counsel for plaintiff in error would liken this deed to a power of attorney,—a mere authority to convey, which loses its vitality at the death of the grantor of the power. It seems to us more like a deed fully executed and placed in escrow, to be finally delivered on the performance of a condition. While ordinarily in case of an escrow title passes at the date of the second delivery, yet often, for the prevention of injustice, the deed will relate back to the first delivery so as to pass title at that time * * * .
>
> "The plaintiffs have no equities superior to those of the purchaser. They are the heirs of the Indian grantor, and as such may rightfully claim to inherit and be secured in the possession of all that property to which he had at his death the full equitable title; but when, as is shown by the approval of the Secretary, he had received full payment of a stipulated

price, and that price was ample, and he had been subjected to no imposition or wrong in making the conveyance, then their claims as heirs cannot be compared in equity with those of the one who had thus bought and paid full value. They certainly do not stand in the attitude of bona fide purchasers. 'A person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term bona fide purchaser * * * '."

The last proviso of Section 1 of the 1945 Act provides; "That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such conveyances shall not be affected by this section." Congress thereby left open to the heirs and devisees of Lucy Harjo any defense of fraud or of lack of consideration of any other defense which they might have other than insufficiency of approval or lack of approval by the Secretary of Interior. If petitioner had any defense to said deed by reason of fraud or failure of consideration, it was saved to her by this proviso and she has in the trial court and the Circuit Court litigated all such questions as she contends may apply. By the phrase "subject to attack upon (other) grounds," the Act means subject to a valid attack only. Certainly it does not mean a frivolous, unfounded, unsound or unmaintainable attack which anyone might make upon a conveyance. The trial court has held on ample evidence and a complete hearing that there was no fraud by Pegg in obtaining the deed from Harjo and that there was an adequate consideration for the deed. The Circuit Court of Appeals has affirmed the decision of the trial court. This brings the case at bar squarely within the reasoning of this Supreme Court in *Lykins* v. *McGrath*, *supra*.

Counsel for petitioner discuss the case of *Pickering* v. *Lomax, supra,* but have rather studiously avoided any attempt to distinguish the case of *Lykins* v. *McGrath, supra.* The language of the Supreme Court in the latter case quoted above very conclusively answers every argument of petitioner in her attempt to distinguish the case of *Pickering* v. *Lomax, supra.*

Another case in point is *Anchor Oil Co.* v. *Gray, supra.* This case involves the construction of Section 2 of the Act of May 27, 1908, which so far as applicable is as follows: "That leases of restricted lands for oil, gas or other mineral purposes, * * * may be made with the approval of the Secretary of the Interior under the rules and regulations provided by the Secretary of the Interior and not otherwise." It appears in that case that a lease was given by the Creek full blood allottee. Before the lease was approved by the Secretary of Interior the allottee died. Her heirs attempted to give a lease to other parties which lease was approved by the County Court having jurisdiction of the allottee's estate. Subsequently the Secretary of Interior approved the original lease executed by the allottee. The United States Supreme Court in that opinion held that the validity of the lease made by the allottee having been conditioned upon the approval of the secretary, such approval might be given at any time, either before or after her death, so far as the rights of her heirs, and the rights of those claiming under them with notice, were concerned, and that the approval, when given, related back and took effect as of the execution of the lease. That case cited and approved the earlier case of *Scioto Oil Co.* v. *O'Hern, supra.*

In *Jones* v. *Merfeldt, supra,* it appears that Jones, a full blood Cherokee Indian, had inherited land from his son, that he attempted to convey the same without approval by the County Court. The deed was placed of record and Jones thereafter died without the deed being approved. His heirs commenced a suit against the grantee in the deed to recover the lands. After the suit was started the grantee went into the proper county court and had the deed approved. The Oklahoma Supreme Court held the approval good, that it related back to the date of the deed, and was effective to cut out the heirs of Jones. The Court pointed out that deeds by full blood Indians conveying lands inherited from the allottee may be approved by the County Court at any time, before or after the death of the grantor, and when so approved, the deed becomes effective so as to cut out heirs of the grantor and in favor of the grantee. This case was followed by the Oklahoma Supreme Court in *Gilbert* v. *Gaines, supra.*

The decisions are conclusive on the proposition that the deed from Harjo to Pegg could have been approved by the Secretary of Interior at any time prior to the death of Harjo; that the petitioner, McElroy, could acquire no greater interest than Harjo had at the time of her death, therefore the deed from Harjo could have been approved by the Secretary at any time after Harjo's death; that petitioner is not in any sense a bona fide purchaser for value without notice of said deed, that she acquired no vested right or interest as against Pegg and his grantees which could not be completely cut off by the subsequent approval of the deed by the Secretary of the Interior.

It necessarily follows, under the holding and reasoning of the trial court and the Circuit Court of Appeals in *Frazier* v. *Goddard, supra,* and *Goddard* v. *Frazier, supra,* that if the Secretary of Interior could approve the deed from Harjo to Pegg after the death of Harjo, then Congress of the United States could validate such deed by dispensing with the necessity of such approval. This was fully within the power of Congress, and Congress did so validate this deed by Section 1 of the Act of July 2, 1945, Public Law 116, 79th Congress, U. S. Stat. 313.

CONCLUSION

The decision of the Circuit Court of Appeals is plainly correct and presents no conflict of decisions. Therefore, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July, 1948.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 99

MATTIE MCELROY, NEE HARJO, PETITIONER

v.

W. M. PEGG, ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The United States was a party to this case in the trial court but did not join in the appeal (R. 344). This memorandum is filed for the purpose of stating the Government's position in the case.

Petitioner is the daughter of Lucy Harjo, a full-blood Chickasaw Indian, and was the devisee of her residuary estate. Lucy Harjo acquired the land in dispute in 1919, the land having been purchased with her restricted funds and the title having been transferred under a restricted form of deed. In

1932 Lucy Harjo executed a deed purporting to convey the land to W. M. Pegg, through whom the other respondents claim title. Petitioner instituted this suit in the United States District Court for the Eastern District of Oklahoma on October 8, 1946, claiming that, for various reasons, the deed of 1932 was invalid and that petitioner became the owner of the land after the death of Lucy Harjo in 1938 (R. 1-12).

The petitioner caused notice of pendency of the action to be served upon the Superintendent of the Five Civilized Tribes on October 8, 1946, pursuant to section 3 of the Act of April 12, 1926, c. 116, 44 Stat. 239 (R. 14). The United States filed a complaint in intervention adopting certain allegations of the complaint and demanding "for itself and for all restricted Indians whose restricted land is involved herein" that the deed of 1932 and conveyances emanating therefrom be cancelled (R. 24-25). At the trial the United States did not produce any evidence and took a neutral position on the question whether the deed of 1932 was valid. The Government took the position, however, that if petitioner should be held to be the owner of the land, it should be held to be restricted. The trial court held that petitioner was not the owner of the land; hence, it did not pass upon this latter question.

Maintaining its neutral position, the United States did not appeal from the judgment and did

not participate in the proceedings in the court below (R. 341, 349). The Government desires to continue to maintain that neutral position in this Court.

Respectfully submitted,

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JULY, 1948

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